ADMINISTRATIVE APPEAL OF

WHATCOM COUNTY PARK BOARD (APPELLANT)

v.

AREA DIRECTOR, PORTLAND AREA OFFICE,

BUREAU OF INDIAN AFFAIRS (RESPONDENT)

LUMMI INDIAN TRIBE (INTEVENOR)

IBIA 77-7-A Decided November 28, 1977

Appeal from a decision of the Area Director, Portland Area Office, Bureau of Indian Affairs, terminating a right-of-way over tidelands of the Lummi Indian Tribe.

Dismissed.

1. Indian Lands: Rights-of-Way

It was not error for the administrative law judge to interpret ambiguous provisions of the subject right-of-way as if they were agreed to in an easement by contract through consideration of the intentions of the parties. If the easement was created by Federal grant, intentions of the parties could still be examined to resolve ambiguous language.

2. Indian Lands: Rights-of-Way

   The intention of the parties was that Appellant would consummate a lease of tribal tidelands as a condition to receiving the grant of a right-of-way over the tidelands.

3. Indian Lands: Rights-of-Way

   Appellant was required to complete a lease of tribal tidelands before it could subject them to public use. The foremost condition of the right-of-way grant was that the public not have access to tribal tidelands before a shellfish protection plan could be incorporated in a lease of the tidelands.

4. Indian Lands: Rights-of-Way

   There was an unauthorized opening of the right-of-way by Appellant before completion of a tidelands lease agreement.

5. Indian Lands: Rights-of-Way

   Appellant was required to make improvements on the right-of-way before it could be opened to the public. The Bureau of Indian Affairs was entitled to cancel the right-of-way grant in accordance with 25 CFR 161.20(a) when Appellant violated this condition.

APPEARANCES: Chester T. Lackey, Esq., Bellingham, Washington, for Appellant; Arthur Biggs, Esq., Regional Solicitor's Office, Department of the Interior, for Respondent; Daniel A. Raas, Esq., Bellingham, Washington, for the Lummi Indian Tribe.

IBIA 77-7-A

OPINION BY ADMINISTRATIVE JUDGE HORTON

This is an appeal by the Whatcom County Park Board (Appellant), from a decision of the Portland Area Director, Bureau of Indian Affairs (Respondent), upholding an action of the Superintendent, Western Washington Agency, Bureau of Indian Affairs, which terminated Appellant's right-of-way over tidelands of the Lummi Indian Tribe (Intervenor). Appellant alleges that the termination is unlawful and inequitable.

Procedural Background

This appeal, filed with the Commissioner of Indian Affairs on September 16, 1976, was referred to the Board for decision on November 9, 1976, by the Acting Deputy Commissioner of Indian Affairs in accordance with 25 CFR 2.19(a)(2). 1/ By order dated November 12, 1976, the Board referred this case to the Hearings Division, Office of Hearings and Appeals, for a fact-finding hearing by an administrative law judge and issuance of a recommended decision, pursuant to 43 CFR 4.361.

1/ That section provides in part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired, the Commissioner of Indian Affairs shall:

* * * * * * *

"(2) Refer the appeal to the Board of Indian Appeals for decision."

A hearing was held on January 11 to 13, 1977, in Bellingham, Washington, by Chief Administrative Law Judge L. K. Luoma. Judge Luoma issued a recommended decision on September 16, 1977, in which he concluded that Appellant's right-of-way was rightfully terminated. The parties were allowed 30 days within which to file exceptions to the recommended decision.

Parts of Judge Luoma's recommended decision have been adopted by the Board, as later set forth. The recommended decision is therefore attached as an appendix to this opinion.

The Secretary of the Interior, in the exercise of his supervisory authority, has expressly reserved the privilege of reviewing the Board's decision in this case upon request by any interested party. Decisions of the Board are otherwise final for the Department. 43 CFR 4.1(2) and 4.21(c). 2/ Accordingly, the parties are advised that they may request a review of this decision by the Secretary.

Explanation of the Right-of-Way

There is general agreement as to the facts below.

2/ Pursuant to 43 CFR 4.5, the regulations of the Office of Hearings and Appeals may not be construed to deprive the Secretary of any power conferred upon him by law. Enclosed with the parties' copies of this decision are two communications from the Office of the Secretary which set forth the additional opportunity for review of this case.

Portage Island, also known as Point Francis, consists of approximately 1,000 acres of naturally occurring land. It is situated in Bellingham Bay, State of Washington, and lies entirely within the boundaries of the Lummi Indian Reservation. The island is connected to the Lummi Peninsula by a strip of tidelands known as the "portage." 3/ Access to and from Portage Island is possible at low tide by crossing the portage on foot or by vehicle. At high tide, the waters of Bellingham Bay flow across the portage. The subject right-of-way consists of an easement across the portage which was obtained by Appellant through the consent of the Lummi Indian Tribe and subsequent approval by the Bureau of Indian Affairs (BIA) in behalf of the Secretary of the Interior.

At one time Portage Island was entirely allotted to individual Indians pursuant to the Treaty of Point Elliott, 12 Stat. 927, II Kappler 669 (1855), and the Treaty with the Omahas, 10 Stat. 1043, 11 Kappler 611 (1854). However, the individual allotments of land did not include the tidelands surrounding the island or the portage. It has long been recognized that these tidelands are held in trust by the United States for the use and benefit of the Lummi Indian Tribe. 4/ United States v. Boynton, 53 F.2d 297

3/ Portage is a word coined by seamen. It is defined in Webster's as the route followed in transferring boats or goods overland from one body of water to another.
4/ The Lummi Indian Tribe is the political successor to certain bands and tribes of American Indians who signed the Treaty of Point Elliott, supra. The Lummi Indian Reservation, which the tribe governs, was enlarged to its present size by the Executive Order of November 22, 1873. I Kappler 917.

9th Cir. 1931); United States v. Stotts, 49 F.2d 619 (W.D. Wash., 1930).

Through the years various Indian allottees or their heirs obtained unrestricted fee patents to their parcels of land on Portage Island. Eventually some of these interests were purchased by non-Indians. By 1966 only about 50 percent of Portage Island remained in Indian ownership.

During 1965 and 1966 several of the non-Indian owners of land on Portage Island developed plans to subdivide their land for sale to other non-Indians. The Lummi Tribe and the Whatcom County Park Board were concerned about the possible individual development of Portage Island through such subdivisions. These two parties were also concerned about county proposals to link Portage Island with another island by bridge.

From the tribe's standpoint, development of Portage Island posed a threat to the traditional way of life of the Lummi people. As the ancestral home of many Lummi Indian families, the island and its tidelands have remained of cultural and historical importance to the Lummi Tribe. Also, from treaty times until today, the beaches and tidelands of Portage Island have been used by tribal members for food gathering.

Since its inception in 1965, the Park Board has regarded Portage Island as a prime location for a county park. In addition to its potential for salt-water oriented activities, such as boating and swimming, the island is known for its scenic qualities. Among other sites, it is situated in view of the Cascade Mountains.

As a result of their respective interests in Portage Island, the Lummi Tribe and the Park Board began negotiations in 1965 with respect to a proposed park on the island. The tribe at this time was poor, as were many of the tribal members. Along with other considerations, therefore, the tribe was encouraged that development of a park on Portage Island would produce income for the tribe and employment opportunities for the Lummi people. The primary source of tribal income was expected to result from the leasing of the Lummi tidelands around Portage Island. Other income was possible through management of concessions at the park.

All parties recognized that conversion of Portage Island into a marine park facility hinged on three developments. First, it was necessary that the Park Board acquire ownership of either all of the land on the island (as maintained in this case by the tribe and the BIA), or as much of the island as possible. Second, the tidelands surrounding the island would have to be leased from the Lummi Tribe in order to satisfy the recreational demands of the public. And third, access to the island would have to be guaranteed by

acquisition of a right-of-way across the portage which is beneficially owned by the tribe.

In the beginning it was envisioned that the Park Board would simultaneously acquire the necessary right-of-way across the portage as well as a lease of the tidelands around the island. In 1966, however, the Park Board learned that its sources of funding for acquiring lands on Portage Island, including the Bureau of Outdoor Recreation of the Department of the Interior, would not make funds available unless the Park Board could show that it had a legal right-of-way to the island. Accordingly, the Park Board requested the Lummi Business Council, which is the governing body of the Lummi Indian Tribe, to consent to the granting of a right-of-way across the portage without awaiting consummation of a general tidelands lease.

On July 29, 1966, the Lummi Business Council passed a resolution which consented to a road right-of-way over the portage. Certain conditions were attached to the tribe's consent. 5/ The precise nature of these conditions and whether or not there was a

5/ The conditions as worded on the face of the Resolution are as follows:

"WHEREAS, it is the desire of the Lummi Business Council that this right-of-way be granted contingent upon the area known as 'Point Francis' or 'Portage Island' being acquired for governmental recreational park purposes, only, and limited exclusively to governmental recreational park purposes, and

failure by the Park Board to fulfill one or more of them form the basis of this appeal. 6/

Review of Recommended Decision and Exceptions

The recommended decision identifies the issues and sub-issues in this case as follows:

> The first issue is whether Appellant fulfilled the conditions contained in the 1966 Tribal Resolution.
>
> A) The first sub-issue is a determination of the applicable law governing interpretation of the 1966 Resolution.

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fn. 5 (continued)

"WHEREAS, the Lummi Business Council also desires that the granting of this right of way shall be subject to access without charge to members of the Lummi Indian Tribe and the right for Lummi Tribal members or legal agents to have access to Lummi Tribal tidelands across the easement and Portage Island for tideland shell fish culture or tideland development, and in the event that for any reason the area known as 'Point Francis' or 'Portage Island' shall cease to be a County park, said right of way with improvements shall automatically revert to the Lummi Indian Tribe, and the granting of this right of way shall be subject to the County to limit the use of this road so as to not allow third parties access to Point Francis other than those cited above, violation of which shall cause automatic reversion of easement and improvements to the Lummi Tribe, and

"WHEREAS, prior to opening the easement to public access, negotiations for the use of tidelands will be undertaken between the parties hereto, in good faith,

"Now, THEREFORE, BE IT RESOLVED that the Lummi Business Council hereby consents to the granting of this right of way, subject to the provisions mentioned above * * *."

6/ For purposes of this administrative appeal, the validity of the original grant of the right-of-way and the authority of the BIA to terminate such rights-of-way are not at issue (Tr. 7, 8). The BIA's post-hearing brief nevertheless provides a detailed explanation of the steps followed in processing the subject right-of-way request and the regulatory requirements in force at the time (Brief of Area Director, at 8-12).

B) The second sub-issue is whether Appellant was required to acquire all land on Portage Island.

C) The third sub-issue is whether the right-of-way grant necessitated that a tidelands lease agreement be completed.

D) The fourth sub-issue is whether the newspaper article of May 14, 1970, constituted a breach of the right-of-way grant.

E) The fifth sub-issue is whether Appellant was required to make improvements across the right-of-way.

The second issue is whether the right-of-way should have been terminated under 25 CFR 161.20.

A) The first sub-issue is a determination of the purpose for which the right-of-way was granted.

B) The second sub-issue is what constituted the reasonable time within which improvements were to be constructed.

C) The third sub-issue is whether a termination of the right-of-way is equitable.

We will follow the above format in reviewing the recommended decision.

I. Were the Conditions Fulfilled

A. Determination of Applicable Law

Judge Luoma concluded that Federal contract law is applicable to the subject controversy (Recommended Decision 5, 8). The Lummi Tribe takes exception to this conclusion. The tribe submits that the subject right-of-way represents a Federal grant of an interest in land and that the terms and conditions of the right-of-way can

be no more nor less than what was federally imposed (Intervenor's Exceptions, at 2-3). 7/

It is not disputed that the Tribal Resolution of July 29, 1966, consenting to the subject right-of-way, is the source document of whatever conditions were attached to the approval of the easement. However, it is also agreed--and Judge Luoma so found--that several of the conditions recited in the Resolution are ambiguously worded (Recommended Decision, 5).

By holding that the grant of the right-of-way in question constituted a complete contract, Judge Luoma resolved ambiguities found in the Tribal Resolution by examining the intentions of the parties. As a result, some of the conditions of the right-of-way were interpreted in a manner contrary to the alleged intentions of the tribe and the BIA.

Technically, the tribe and the BIA may be correct that the subject right-of-way was acquired by grant and not by contract. 8/ Nevertheless, the rules of construction are the same for easements

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7/ The BIA did not file exceptions to the recommended decision but it advanced the same argument as the tribe in its post-trial brief. See Brief of Area Director, at 16-20.

8/ Rights-of-way granted under authority of 25 CFR 161 are considered to be in the nature of easements. See 25 CFR 161.18 (1976) and 25 CFR 161.19 (1966). The usual practice is that easements are acquired by grant, although they may arise by contract. 25 Am. Jur. 2d, Easements and Licenses, § 17; Thompson on Real Property, Vol. 2, § 331. Whereas the term "grant" is repeatedly cited in 25 CFR Part 161, the term "contract" does not appear.

by grant and easements by contract. 25 Am. Jur. 2d, Easements and Licenses, §§ 22-23. Accordingly, if the language of an easement is uncertain or ambiguous in any respect, regardless of whether the easement arose by grant or contract, "all the surrounding circumstances, including the construction which the parties have placed on the language, may be inquired into and taken into consideration by the court, to the end that the intention of the parties may be ascertained and given effect." Fox v. Miller, 150 F. 320 (9th Cir. 1906).

We know of no authority which says that intentions of the parties may not be considered in resolving ambiguous Federal grants or contracts, or more specifically that ambiguous provisions in a right-of-way across Indian land shall be interpreted only in accordance with the intentions of the Indians.

As a Federal grant in an interest in land, however, it is clear that the subject right-of-way would not evoke the common-law rule of construction advanced by Appellant, viz., that an ambiguously worded easement will be construed favorably to the grantee. 9/ That rule is reversed when Federal grants are involved so that doubtful expressions in such grants are to be construed favorably to the government. United States v. Union Pacific Railroad Co., 353 U.S.

9/ Brief of Appellant filed June 2, 1977, at 11.

112 (1957); United States v. Grand River Dam Authority, 363 U.S. 229 (1960); Caldwell v. United States, 250 U.S. 14 (1919). 10/

It is noted that the recommended decision does not make reference to rules of construction favoring either party. Such reliance is generally regarded as a device of last resort and inappropriate when the intentions of the parties are otherwise ascertainable.

[1] In summary, we hold that it was not error for the Administrative Law Judge to interpret ambiguous provisions of the subject right-of-way as if they were agreed to in an easement by contract through

10/ In furtherance of this rule, the tribe and the BIA suggest that Federal law requires ambiguities contained in rights-of-way over Indian land to be construed favorably to the Indians (Brief of Area Director, at 20; Post-Hearing Memorandum of Lummi Indian Tribe, at 9; Intervenor's Exceptions to Recommended Decision, at 3). None of the cases cited by the parties makes this point. The only right-of-way case referred to is Bennett County, South Dakota v. United States, 394 F.2d 8 (8th Cir. 1968), but the chief issues there were whether certain Indian treaties amounted to recognition of Indian title and whether the Highway Act of 1866 specifically granted easements for highway purposes over the land in question. The Bennett County case simply reenforced the fundamental principle enunciated in Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), that ambiguities in Federal treaties or statutes dealing with Indians be resolved in their favor.

The Whatcom County case does not involve interpretation of Federal treaties or statutes but of a Federally approved right-of-way over Indian land. The task of resolving ambiguities in this grant is more akin to resolving ambiguities in a Federally approved lease of Indian land. With respect to the latter, it has been held that proper interpretation is dependent on the intentions of the parties. United States v. Lewiston Lime Company, 466 F.2d 1358 (9th Cir. 1972).

consideration of the intentions of the parties. If the easement was created by Federal grant, intentions of the parties could still be examined to resolve ambiguous language. Further, the recommended decision does not suggest that doubtful expressions in the right-of-way provisions were unlawfully construed in favor of the grantee in contradiction of the canons of construction concerning Federal grants. Whatever favorable interpretations were received by Appellant appear to have resulted from the Judge's evaluation of the evidence.

B. Acquisition of Land Requirement

A major issue at the hearing was whether the grant of the subject right-of-way required Appellant to purchase all land on Portage Island. The tribe and the BIA argued that this was a condition of the grant. The Park Board, which has acquired substantially all of the land there, but not all of the land, disagreed.

Judge Luoma found that there was no 100 percent acquisition requirement. None of the parties filed an exception to this finding. The Board adopts Judge Luoma's recommended findings on this sub-issue and they are incorporated by reference to pages 6-7 of the recommended decision.

C. Lease of Tidelands Requirement

[2] The third sub-issue, as framed by the Administrative Law Judge, is whether the 1966 Resolution necessitated that a tidelands lease agreement be completed. Judge Luoma found that it did not. The Board disagrees.

We think it is clear that the parties knew that at some time a tidelands lease agreement had to be completed. The issue which consumed a major portion of the hearing was whether or not such an agreement had to be completed before Appellant could open the right-of-way to public access.

Other findings of the Administrative Law Judge support the conclusion that a tidelands lease agreement was required. These are:

> * * *Development of the island would serve Appellant as an excellent park facility and would serve the Tribe by providing jobs for tribal members as well as income from lease of tidelands surrounding Portage Island (Tr. 19, 351).

At p. 4.

> When Appellant initiated negotiations with the Tribe, both parties intended that a right-of-way providing access to Portage Island, and a lease of the tribal tidelands surrounding the island, would be concluded simultaneously. However, the Tribe gave its consent to the grant of a right-of-way before a lease of the tidelands was agreed upon (Tr. 351).

> The Tribe waived its right to monetary compensation for Appellant's use of a 200-foot wide right-of-way because the tidelands over which the right-of-way passed were considered to be part of the tidelands to be leased by Appellant at a later date (Tr. 347, 351-52). [Emphasis added.]

At pp. 4-5

> * * *[N]o monetary benefit accrued to the Tribe under the right-of-way grant, but rather was deferred and was to be included in the tidelands lease.

At pp. 7-8.

The testimony from Park Board officials consistently indicated that unless they could obtain a lease of the tidelands around Portage Island, it was not reasonable to plan a marine park there (Tr. 128, 170, 183-185).

Nor, in Appellant's opinion, was there a likelihood that State and Federal agencies would fund a marine park project without availability of the tidelands (Tr. 171). Accordingly, in Appellant's application for funding from the Department's Bureau of Outdoor Recreation, it was represented that Portage Island Park would provide the following recreational uses, among others: swimming, water skiing, skin and scuba diving, salt-water fishing, and boating (Exh. W-3, Tr. 177).

Members of the Lummi Business Council testified that a tidelands lease agreement was a definite condition of the right-of-way

grant and that such a lease had to be completed before the island could be opened to the public (Tr. 213, 236, 263, 293, 295, 300). The tribe's paramount concern was that public use of the park and tidelands would endanger the shellfish culture unless a lease agreement existed which guaranteed effective protection (Tr. 207, 227, 297).

While income from a tidelands lease may have been a secondary consideration to the Lummi Indians (Tr. 213), the BIA's approval of the right-of-way was influenced considerably by the economic advancements which a lease of the tidelands would mean to a very poor tribe (Tr. 337). In addition, the Park Board realized that the only "direct dollar recompense" which the tribe stood to gain from Appellant in the right-of-way arrangement was through lease of its tidelands (Tr. 109, 110).

The tribe submits in its exceptions to the recommended decision that Judge Luoma's finding that a completed lease agreement was not a condition of the subject easement "leads ineluctably to the conclusion that the right-of-way is granted without consideration" (Intervenor's Exceptions, at 3). Under 25 U.S.C. § 325 (1970), no grant of a right-of-way over Indian land may be made without the payment of just compensation. Since the parties have stipulated to the validity of the subject easement (Tr. 8), it is not necessary to

decide whether the right-of-way was supported by just compensation. 11/ However, we agree that it is of interpretative value to contemplate the tribe's incentive to consent to the subject right-of-way in the absence of a tidelands lease guarantee, as well as the motives of the BIA which granted the easement in its fiduciary capacity.

The recommended decision observes that no material or essential terms of a tidelands lease were specified in the 1966 Resolution, and that to be enforceable, an agreement to make a future contract must include such specificity (Recommended Decision, 8). Assuming arguendo that this general rule of contracts is applicable when a future lease requirement is imposed as a condition to an easement grant, it is arguable that most of the material terms of the contemplated lease were preordained in this case, including, e.g., the names of the parties, a description of the premises, length of the term (co-extensive by necessity with the term of the easement), and amount of rental (by law, Indian land cannot be leased for less than fair annual rental, except as otherwise provided at 25 CFR 131.5(c)).

11/ The BIA's theory of compensation was stated in its letter of March 8, 1976, to the Park Board as follows:

"Since no monetary compensation was paid to the Lummi Tribe for this easement, the grant was approved based upon the consideration that the terms and conditions * * * contained in the resolution of the Lummi Business Council * * * would be faithfully performed."

However, because the parties have stipulated to the validity of the subject right-of-way, our present task is simply to ascertain the conditions attached thereto. From the evidence previously detailed, we hold that one condition was the consummation of a lease of Lummi tidelands around Portage Island.

As previously stated, the Board believes the issue formed by the record is not whether a tidelands lease was required, but when it was required.

[3] The evidence is susceptible to only one logical conclusion. A lease of the tidelands was mandatory before the Appellant could subject the tidelands to public use.

Notwithstanding that the 1966 Resolution conveys at one point that upon commencement of good faith negotiations for the use of the tidelands, the right-of-way may be opened to the public, 12/ it is completely inconsistent with the understanding of any of the parties that the tidelands would be exposed to public traffic before a tidelands protection plan could be finalized in a completed lease agreement.

12/ See fn. 5, last "WHEREAS" clause.

Park Board officials acknowledged at the hearing that a major concern of the Lummi Indian Tribe and the Board itself, was development of a shellfish protection plan (Tr. 64, 65, 93, 155). Prior to the hearing, a legal spokesman for the Park Board stated to the BIA in response to alleged violations of the right-of-way grant: "Contrary to the impression I gain from your letter, there has been no official opening of the park to the public. As a matter of fact, the park cannot be opened until this problem over the lease of the tidelands has been resolved." 13/

While various Lummi officials disagreed on some points at the hearing, the issue of tidelands protection evoked united, oratorical replies. According to the tribe, the clearest and most important of all conditions attached to the right-of-way grant was that the public not have access to Lummi tidelands before shellfish protection could be organized by agreement with the Appellant. See Tr. 203, 204, 207, 208, 212, 213, 219, 220, 221, 222, 227, 236, 237, 293, 296, 297, 502.

The Administrative Law Judge, who questioned at the hearing why such a vital element of the right-of-way grant was not clearly spelled out in the 1966 Resolution (Tr. 236, 237), ultimately

13/ Exh. 20, p. 2.

found that "the protection of the tidelands is an essential part of the right-of-way grant" (Recommended Decision, 8). 14/

We hold that tidelands protection was the foremost condition of the right-of-way grant and that it was therefore understood that Lummi tidelands would not be subjected to public use before a plan for such protection was negotiated in a lease.

D. Was the Easement Opened

The fourth sub-issue under the matter of condition fulfillment involves the allegation that there was an unauthorized opening of Portage Island to the public.

On May 14, 1970, an article appeared in the Bellingham Herald newspaper under the headline "Park Campground Set For Summer Season."

14/ Initially, the parties were not bothered by the seeming vagueness of the 1966 Resolution. Forrest Kinley, a 20-year member of the Lummi Business Council, explained to Judge Luoma that the Resolution was created between "neighbors * * * people just like ourselves * * * interested in a project" (Tr. 237; see also Tr. 501-502).
Counsel for Appellant has stated:

"The initial dealing between the Parks Department and the tribe was cooperative. It is apparent that consent was not granted in an adversarial setting. The very imprecision of the 1966 Resolution supports this conclusion. As a result, no hard enforceable agreement was worked out, and both parties assumed that the present attitudes would prevail. Therefore, the language of the resolution should be viewed in that context" (Brief of Appellant filed June 2, 1977, at 12).

(Exh. 11.) In this article Appellant's Director, Mr. Kenneth Hertz, was quoted as saying that Portage Island is 1,000 acres of undeveloped land, accessible by a hike or by boat, but that the park's development plans had not yet been determined by the county. The article also stated:

> The county has a 200-foot easement on Indian tidelands at the sand spit so that the public can get to the island.
>
> Persons can hike across the spit at low tide of plus 3.5 feet or less. During the summer, persons can walk across about 80 percent of the time, but Hertz advised persons going to the island to bring their tide table books.

The only admonition reported in the article was that campers should bring litter bags and be cautious with fires.

Mr. Hertz testified that he believed he had authority to advise the public that they could go to Portage Island. He stated that the newspaper article was prompted by inquiries he was receiving as to whether the island was available for public use (Tr. 77).

Subsequent to tribal objection over the foregoing article, the Park Board Director sent news releases to the Herald for clarification that visitors to the island should first seek permission from the Lummi Tribe (Tr. 56; Exh. 39, pp. 15-16).

On June 12, 1970, the Park Board Director wrote a letter of apology to the Chairman of the Lummi Business Council (Exh. W-3). The opening paragraph states: "Please let me take this opportunity to express to you and the Lummi Tribal Council my most sincere apologies for any problems created due to the increased public use of Portage Island tidelands."

That the May 14, 1970 article in fact resulted in public use of the tidelands was proven. Kenneth Cooper, a Lummi policeman, testified that after the Herald article was published, people began coming to the island and the tidelands (Tr. 431, 432). Some who came went clam digging and removed oysters from the tribal shellfish beds (Tr. 433). Tribal council members also testified to the public use of Lummi tidelands after the Herald article was published (Tr. 256, 257, 274, 275).

The Park Board does not deny that it promoted public access to Portage Island in 1970 (Tr. 77-78, 82, 84). While Appellant denies that there was an official opening of the park, its position in this appeal has been that because good faith negotiations for a lease of the tidelands had been commenced, any opening of the easement to the public was nevertheless justified. The Administrative Law Judge so held. (Recommended Decision, 9.)

We have already ruled, however, that the Appellant was not at liberty to open the easement to public access until such time

as a tidelands lease had been completed. This condition stemmed from the obvious detriment which public access would present to the tribe's shellfish culture.

[4] We further rule that it is clear that there was an unauthorized opening of the subject right-of-way in May 1970. Whether or not such opening was "official" is irrelevant in finding a violation of the condition. 15/

The record shows that subsequent to the opening, Appellant took no steps to patrol Portage Island and made only token attempts to preserve tribal interest in the tidelands (Recommended Decision, 9). 16/ As previously detailed, the fears of the tribe associated with premature public admission were in some degree realized.

E. Construction of Improvements

The fifth sub-issue is whether Appellant was required to make improvements across the right-of-way. Judge Luoma found that at

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15/ The 1966 Resolution does not contain the word "official" in its reference to opening of the easement. See fn. 5, last "WHEREAS" clause. That "unofficial" openings were also prohibited is obvious. Indeed, more harm would seem foreseeable from a premature unofficial opening than from a premature official opening for which preparation might be expected.

16/ The recommended decision points out that the 1966 Resolution does not specifically require either party to protect tribal tidelands and that Appellant was not regarded by the tribe as having the sole duty of protection (Recommended Decision, 8).

the time the Lummi Business Council gave its consent for the right-of-way, all the parties contemplated that improvements would be constructed (Recommended Decision, 10).

Appellant does not deny that improvements to the right-of-way were contemplated, but contests the subsequent findings of the Administrative Law Judge regarding the scope and timing of improvement construction (Appellant's Brief on Exceptions, at 3-5).

We hold that Appellant was required to make improvements on the right-of-way and Judge Luoma's findings to this effect are incorporated by reference to page 10 of the recommended decision.

II. Should the Easement Have Been Terminated

The Board incorporates the procedural history of the easement termination recited in the recommended decision by reference to pages 10-11 therein.

A. Purpose of the Right-of-Way Grant

The Board adopts Judge Luoma's finding that although Appellant may have requested the subject right-of-way to assure funding agencies that access existed to Portage Island, the conditions contained in the 1966 Resolution were an inalienable part of the

grant. The grant, therefore, is terminable if any condition attached to the grant is unfulfilled (Recommended Decision, 11).

B. Time for Construction of Improvements

We have previously affirmed the finding that Appellant was obligated to make improvements across the right-of-way as a condition of the 1966 Resolution. The next question is when were such improvements to be made.

Judge Luoma found that commencing in at least 1969, the issue of nonuse of the right-of-way had been raised and that because Appellant has to this date not constructed improvements across the easement, there has been a breach of a condition of the grant (Recommended Decision, 12). 17/

Appellant takes strong exception to the finding that the issue of nonuse was raised in 1969 (Appellant's Brief on Exceptions, at 5-8). We agree that such finding is not supported by the evidence cited in the recommended decision (i.e., Tr. 49), nor does it comport with the record as a whole. Rather, it appears that nonuse

17/ The nonuse issue derives from application of 25 CFR 161.20 which provides that a right-of-way shall be terminable for "(b) A nonuse of the right-of-way for a consecutive 2-year period for the purpose for which it was granted."

In 1966, the regulations merely stated that rights-of-way were terminable for nonuse, omitting reference to any period of time. 25 CFR 161.19 (1966).

was first alleged on April 9, 1971, when the Acting Superintendent of BIA's Western Washington Agency issued a notice of violation to the Appellant in which the requirements of 25 CFR 161.20 were quoted (Exh. 15). 18/

Appellant submits that the nonuse theory for termination is unjustified regardless of the date that it may have first been raised. Appellant contends first, that it was understood by the parties that no improvements would be made to the right-of-way until the nature of such construction was agreed to by the Lummi Business Council, and second, that the prospects for such agreement were frustrated by the actions of an uncooperative tribe (Appellant's Brief on Exceptions, at 4).

The testimony indeed shows that the tribe expected to be consulted on the nature of any easement improvement and that no improvements were to be made until after Appellant acquired the uplands of the island and negotiated a lease of the tidelands (Tr. 269-270). 19/

18/ The issue was later addressed in the tribe's resolution of November 4, 1975 (Exh. 36), and the BIA's "show cause" letter to the Park Board dated March 8, 1976 (Exh. 37). The BIA sent a letter to the Appellant in 1969 which advised that failure to comply with the conditions contained in the Tribal Resolution of July 29, 1966, could result in revocation of the easement. However, this letter did not make reference to federal regulations or the question of nonuse (Exh. 8).

19/ Appellant took this position in its brief on exceptions: "It is equally undisputed that Appellant and the tribe contemplated

[5] The BIA official who drafted the 1966 Resolution for the tribe testified that the intent of the easement grant was that an improvement to the right-of-way would be completed before the easement could be opened (Tr. 346, 347). The Board holds that this interpretation is consistent with all other conditions of the right-of-way, and particularly the matter of shellfish protection.

Because the Appellant opened the right-of-way to the public before improvements were constructed, we hold that the BIA was entitled to cancel the easement pursuant to 25 CFR 161.20(a). 20/

C. Was Termination Equitable

Judge Luoma concluded that the Department should uphold termination of the right-of-way notwithstanding that the Park Board has expended money and effort to purchase property on Portage island and that the BIA did not act promptly to preserve the trust res (Recommended Decision, 12). We concur and incorporate by reference his findings and conclusions in this regard.

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fn. 19 (continued)
that the improvements were not to be constructed until after uplands had been acquired and the tidelands leased." (At p. 7.)
The foregoing statement is also noteworthy because it conveys Appellant's understanding that a tidelands lease had to be completed.

20/ This section provides that a right-of-way is terminable for: "(a) Failure to comply with any term or condition of the grant or the applicable regulations." The foregoing provision was quoted to Appellant in the BIA's April 9, 1971 notice of violation (Exh. 15) and its subsequent notice dated March 8, 1976 (Exh. 37).

The following additional opinions are furnished.

While there is ample support for Appellant's claim that the Lummi Indian Tribe unilaterally decided in 1972 that it did not want to go ahead with plans for a park on Portage Island, the record is convincing that this change of attitude occurred only after the Appellant breached important conditions of the right-of-way grant. The relationship between events was made plain (Tr. 208, 209).

Further, although the Park Board has invested substantial funds towards acquisition of land on Portage Island, it possesses a valuable piece of real estate and may yet achieve some tidelands rights.

Finally, when the equities are weighed it cannot be overlooked that the Lummi Indian Tribe, which has long been poor, never derived a dollar from an unsuccessful easement plan.

There remains the common interest of both sides that Portage Island be perpetuated as a wilderness area. But for the right-of-way which was granted, it would likely not be so now. The Board is hopeful that a natural park can yet be established on Portage Island to the satisfaction of the Lummi Indians and all residents of Whatcom County.

Summary

The issue in this appeal has been whether the termination of Appellant's right-of-way should be upheld. The Board holds that it should on the basis that conditions of the right-of-way grant, which were primarily imposed to protect the shellfish culture of the Lummi Indian Tribe, were violated by Appellant in two ways: (1) Appellant opened the right-of-way to public use before completion of a tidelands lease agreement; and (2) Appellant opened the right-of-way to public use before construction of improvements on the right-of-way.

ORDER

The appeal is dismissed.

Because the Secretary has reserved the right to review this decision upon request by any interested party, the above Order will not be made effective for a period of sixty (60) days from the date of this decision in order to allow sufficient time for the submission

of review requests to the Secretary. A timely request for review shall stay the effectiveness of this decision.

Done at Arlington, Virginia.

Wm. Philip Horton
Administrative Judge

We concur:

Alexander H. Wilson
Chief Administrative Judge

Mitchell J. Sabagh
Administrative Judge

United States Department of the Interior APPENDIX
Office of Hearings and Appeals
Hearings Division
4015 Wilson Boulevard
Arlington, Virginia 22203

ADMINISTRATIVE APPEAL OF	:	LUMMI - WHATCOM COUNTY
WHATCOM COUNTY PARK BOARD,	:	ROAD RIGHT-OF-WAY
Appellant	:	
v.	:	
AREA DIRECTOR, PORTLAND AREA	:	IBIA 77-7-A
BUREAU OF INDIAN AFFAIRS,	:	
Respondent	:	
LUMMI INDIAN TRIBE,	:	
Intervenor	:	

RECOMMENDED DECISION

Appearances: Chester T. Lackey, Esq, Bellingham, Washington, for Appellant;
Arthur Biggs, Esq., Regional Solicitor's Office, Department of the Interior, for Respondent;
Daniel A. Raas, Esq., Bellingham, Washington, for the Lummi Indian Tribe.

Before: Chief Administrative Law Judge Luoma

BACKGROUND

On September 16, 1976, the Whatcom County Park Board (Appellant) appealed a decision of the Portland Area Director, Bureau of Indian Affairs (Respondent) which terminated a right-of-way over the tidelands of the Lummi Indian Tribe. On November 9, 1976, the Acting Deputy Commissioner of Indian Affairs referred this appeal to the Interior Board of Indian Appeals in accordance with 25 CFR 2.19(a)(2). 1/ By order dated November 12, 1976, the

1/ That section provides in part:

"(a) Within 30 days after all time for pleadings (including extension granted) has expired the Commissioner of Indian Affairs shall: * * *

"(2) Refer the appeal to the Board of Indian Appeals for decision."

Interior Board of Indian Appeals, pursuant to 43 CFR 4.1, 2/ referring this matter to the Chief Administrative Law Judge for a fact-finding hearing de novo. A hearing was held on January 11 to 13, 1977, in Bellingham, Washington. At the hearing, the Lummi Indian Tribe was permitted to join the proceeding as an intervenor.

Portage Island and the tidelands that surround it are part of the Lummi Indian Reservation (Tr. 15). In 1966, Appellant entered into negotiations with the Lummi Tribe for the creation of a park on Portage Island. The park would be reached by a right-of-way across tribal tidelands. The park, as first envisioned, was to include the land on Portage Island as well as a recreational lease of the tidelands which surround the island.

For purposes of this administrative appeal, the validity of the original grant of the right-of-way and Respondent's authority to terminate such rights-of-way are not at issue (Tr. 7, 8). 3/

2/ That section provides, in part:

"The Office of Hearings and Appeals, headed by a Director, is an authorized representative of the Secretary for the purpose of hearing, considering and determining, as fully and finally as might the Secretary, matters within the jurisdiction of the Department involving hearings, and appeals and other review functions of the Secretary. Principal components of the Office include (a) a Hearings Division comprised of administrative law judges who are authorized to conduct hearings in cases required by law to be conducted pursuant to 5 U.S.C., sec. 554, * * * and hearings in other cases arising under statutes and regulations of the Department, * * *.

"(2) Board of Indian Appeals. The Board decides finally for the Department appeals to the head of the Department pertaining to (i) administrative actions of officials of the Bureau of Indian Affairs, issued under Chapter I of Title 25 of the Code of Federal Regulations, in cases involving determinations, findings and orders protested as a violation of a right or privilege of the appellant, * * *." (Footnote omitted.)

3/ 25 CFR 161.5, Application for right-of-way, provides, in part:

"Written application * * * for a right-of-way shall be filed with the Secretary. The application shall cite the statute or statutes under which it is filed and the width and length of the desired right-of-way, and shall be accompanied by satisfactory evidence of the good faith and financial responsibility of the applicant. * * * Except as otherwise provided in this section, the application shall be accompanied by a duly executed stipulation * * * expressly agreeing to the following:

"(a) To construct and maintain the right-of-way in a workmanlike manner.

ISSUE

The first issue is whether Appellant fulfilled the conditions contained in the 1966 Tribal Resolution.

A) The first sub-issue is a determination of the applicable law governing interpretation of the 1966 Resolution.

B) The second sub-issue is whether Appellant was required to acquire all land on Portage Island.

C) The third sub-issue is whether the right-of-way grant necessitated that a tidelands lease agreement be completed.

D) The fourth sub-issue is whether the newspaper arcticle of May 14, 1970, constituted a breach of the right-of-way grant.

E) The fifth sub-issue is whether Appellant was required to make improvements across the right-of-way.

The second issue is whether the right-of-way should have been terminated under 25 CFR 161.20. 4/

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fn. 3 (continued)

"(b) To pay promptly all damages and compensation * * * determined by the Secretary to be due the landowners and authorized users and occupants of the land on account of the survey, granting, construction and maintenance of the right-of-way.

"(c) To indemnify the landowners * * * for loss of life, personal injury and property damage arising from the construction, maintenance, occupancy or use of the lands by the applicant,* * *.

"(d) To restore the lands as nearly as may be possible to their original condition upon the completion of construction to the extent comparable with the purpose for which the right-of-way was granted.

"(e) To clear and keep clear the lands within the right-of-way to the extent compatible with the purpose of the right-of-way * * *.

"(h) To build and repair such roads, fences, and trails as may be destroyed or injured by construction work * * *.

"(k) That the applicant will not interfere with the use of the lands by or under the authority of the landowners for any purpose not inconsistent with the primary purpose for which the right-of-way is granted * * *."

4/ That section provides, in part:

"All rights-of-way granted under the regulations in this part shall be terminable in whole or in part upon 30 days written notice from the Secretary mailed to the grantee at its latest address furnished in accordance with § 161.5(j), for any of the following causes:

A) The first sub-issue is a determination of the purpose for which the right-of-way was granted.

B) The second sub-issue is what constituted the reasonable time within which improvements were to be constructed.

C) The third sub-issue is whether a termination of the right-of-way is equitable.

Discussion, Findings and Conclusions

Portage Island consists of approximately 1,000 acres and is connected to the mainland by a strip of tidelands known as the "portage." At low tide, the portage is crossable by foot or vehicle. At high tide, the waters of Bellingham Bay flow across the portage. The subject right-of-way crosses the portage (Tr. 21).

Years before this controversy, Portage Island had been entirely allotted to individual Indians, however, these allotments of land did not include the tidelands which surround the island (Tr. 20-22). The tidelands are held in trust by the United States for the use and benefit of the Lummi Indian Tribe, United States v. Boynton, 53 F.2d. 297 (1931).

In 1965, Appellant, a municipal corporation organized under the laws of the State of Washington, was created to set up and administer a system of county parks. Accordingly, Appellant designated certain areas in Whatcom County which were appropriate for use as water-front parks. Portage Island was a high priority in this designation (Tr. 11, 12). Development of the island would serve Appellant as an excellent park facility and would serve the Tribe by providing jobs for tribal members as well as income from lease of tidelands surrounding Portage Island (Tr. 19, 351).

When Appellant initiated negotiations with the Tribe, both parties intended that a right-of-way providing access to Portage Island, and a lease of the tribal tidelands surrounding the island, would be concluded simultaneously. However, the Tribe gave its consent to the grant of a right-of-way before a lease of the tidelands

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fn. 4 (continued)

"(a) Failure to comply with any term or condition of the grant or the applicable regulations;

"(b) A non-use of the right-of-way for a consecutive 2-year period for the purpose for which it was granted;

"(c) An abandonment of the right-of-way.

"If within the 30-day notice period the grantee fails to correct the basis for termination, the Secretary shall issue an appropriate instrument terminating the right-of-way * * *."

was agreed upon (Tr. 351). The Tribe waived its right to monetary compensation for Appellant's use of a 20-foot wide right-of-way because the tidelands over which the right-of-way passed were considered to be part of the tidelands to be leased by Appellant at a later date (Tr. 347, 351-52).

On July 29, 1966, the Lummi Business Council enacted a resolution which gave consent to the right-of-way (Exh. 1). The Lummi Business Council is the governing body of the Lummi Tribe.

In 1966 and 1967, intense negotiations were held concerning lease of the tidelands. In 1968 and 1969, negotiations were less frequent (Tr. 11-13). Notwithstanding the lack of progress in negotiating a tideland lease, Appellant acquired property on Portage Island. Acquisition of the property did not include any tideland interest because of the tideland's trust status. To date, Appellant has acquired all but two interests in land on Portage Island (Tr. 11).

All lands in question are located in Whatcom County. Acquisition of land by Appellant on Portage Island does not affect reservation boundaries (Tr. 13-16).

The first issue is whether the conditions contained in the 1966 Tribal Resolution, which gave consent for the right-of-way, were fulfilled.

The Resolution which granted the right-of-way across the Portage, contains a number of conditions which are limitations upon the grant of the right-of-way. Several of these conditions are ambiguously worded. This necessitates interpretation of the language used there.

The first sub-issue is a determination of the applicable law governing interpretation of the 1966 Resolution.

The Tribe contends that the rules of statutory construction must be applied to ascertain intent where the 1966 Tribal Resolution is ambiguous. The basis of this contention is that an Indian Tribe is analogous to any other local government, and that a resolution of the Tribal Business Council has the force of law upon the Lummi Indian Reservation.

I find that Federal contract law is applicable to the subject controversy. On August 14, 1967, Appellant's application for the right-of-way, which included the 1966 Resolution, was recorded. Although the grant of the right-of-way constituted a grant of an interest in land, the 1966 Resolution was a contract whereby the Tribe gave its consent to the right-of-way in return for the fulfillment of certain conditions by Appellant. A resolution of the Business Council has the force of law upon the Tribe, however, the

1966 Resolution was written as a result of, and was directed to, negotiations which took place between the Tribe and Appellant. In 1966, both the Tribe and Appellant were working toward a common goal, i.e., the development of a park on Portage Island. The 1966 Resolution was written, adopted and agreed to in an atmosphere of cooperation. Both parties assumed that cooperation would prevail and the language of the resolution must be viewed in that context (Tr. 377). Administrative Appeal of Brown County, Wisconsin, IBIA 74-32-A (June 47, 1974).

The second sub-issue is whether Appellant was required to purchase all land on Portage Island.

Prior to 1966, three types of land ownership existed on Portage Island; i.e., land held in fee by Indians, land held in fee by non-Indians, and land held by the Government in trust for Indians Tr. 33). The land now owned by Appellant is owned in fee (Tr. 13, 239).

During 1965 and 1966, several non-Indian owners of fee land on the island planned to subdivide their land for sale to other non-Indians. Both the Tribe and Appellant wanted to prevent individual development of the island through such subdivisions (Tr. 33-34, 62, 169, 174, 264, 228).

Although Appellant did not acquire all of the land on Portage Island, Appellant has acquired the ownership of substantially all land there (Tr. 11). The land which is not owned by Appellant consists of two relatively small tracts (Tr. 58). These tracts are owned by members of the Lummi Tribe. One tract is owned in fee, the other is held in trust by the U.S. Government for individual Indians (Tr. 260, 261, 307, 308, 317).

On June 8, 1971, a cotenant of the tract held in trust conveyed a 1/2,000 interest to the Tribe as a gift (Exh. L-3, Tr. 25, 308). This was done to prevent Appellant from acquiring that interest through condemnation proceedings (Tr. 320-23). Land held in trust for Indians is conveyed through mechanisms set up by Respondent, but neither the Tribe nor Respondent induced or encouraged the making of this gift deed to the Tribe (Tr. 261, 311-312).

Federal law allows the condemnation of lands held in trust for individual Indians (25 U.S.C. § 257), but there is no provision of Federal law which allows the condemnation of lands held in trust for an Indian tribe, United States v. 10.69 Acres, etc, Yakima City, 425 F.2d 317 (9th Cir. 1970).

That provision of the tribal resolution which deals with the acquisition of land on Portage Island states that the right-of-way is granted contingent upon the area known as "Portage Island" being acquired for governmental park purposes only.

Appellant contends that there was no 100 percent acquisition requirement and if there were such a requirement, Respondent's action in approving transfer of an interest in land to the Tribe was a breach of the requirement (Tr. 89, 112).

Respondent contends that the subject language required Appellant to purchase the entire island and develop the land for public use (Tr. 342, 338, 339).

I find that there was no 100 percent acquisition requirement contained in the Tribal resolution. The 1966 Resolution did not state that all land must be acquired, the resolution only stated that Portage Island would be used only for park purposes. The most logical way of preserving Portage Island solely for governmental park purposes is the acquisition of 100 percent of the island by Appellant. However, it does not follow that a 100 percent fee acquisition of the island is the only method available. Situations are conceivable whereby Appellant could assure use of the island solely for governmental park purposes without total acquisition of the land there. An example of such a situation would be the use of strict scenic easements.

Appellant had initiated condemnation proceedings against land which it could not buy outright, including the two plots discussed above (Tr. 67, 68, 317). Until the mid 1970's, Appellant continued to negotiate for these areas (Tr. 51). In effect, Appellant, by its acquisitions and continued negotiations for acquisition, was assuring that Portage Island would be used for park purposes only.

Appellant's contention that Respondent should not have allowed the conveyance of an interest to the Tribe because such was inconsistent with a 100 percent acquisition requirement is not valid. Respondent has a fiduciary duty to both individual Indians and to the tribe. Each duty is independent from the other (Tr. 478, 479). I have found that there was no 100 percent requirement. This finding is based upon the wording of the document and the situation which existed when the resolution was drafted. That the Tribe may have gained a 1/2,000 interest in land on Portage Island is not inconsistent with Portage Island's status as a park. Similarly, that the Appellant has not acquired all land on the island does not necessarily threaten the park status of the island. To date, Appellant has acquired substantially all of the 1,000-acre island and, therefore, has substantially complied with its duty to prevent the land on Portage Island from being used for other than park purposes.

The third sub-issue is whether the 1966 Resolution necessitated that a tidelands lease agreement be completed.

Since the Tribe agreed to grant immediate access to the park by means of a right-of-way and since no monetary benefit accrued to the

Tribe under the right-of-way grant, but rather was deferred and was to be included in the tidelands lease, the Tribe contends that a reasonable time limit was implied for conclusion of the tideland lease (Tr. 347, 351, 420) and that a right-of-way could not be opened for public use until such a lease had been completed (Tr. 263, 293, 295, 300).

The grant of the right-of-way constituted a complete contract. To be enforceable, an agreement to make a future contract must specify all material and essential terms with none left to be agreed upon as the result of future negotiations. The 1966 Resolution merely anticipated that a tidelands lease would be negotiated at some future time. No material and essential terms of that lease were specified. I find, therefore, that the 1966 Resolution did not necessitate that a tidelands lease be completed.

The fourth sub-issue is whether the newspaper article of May 14, 1970, constituted a breach of the right-of-way grant.

The 1966 Resolution states that prior to opening the right-of-way to public access, negotiations for the use of the tidelands will be undertaken, between the parties, in good faith.

Appellant commenced negotiations to obtain a lease of the tribal tidelands surrounding Portage Island in 1966. From 1966 to 1969, there were meetings between Appellant and the Tribe to negotiate mutually agreeable terms and conditions. These meetings produced several proposed leases (Exhs. W-1, B-2 through B-7). The last draft of a proposed lease was prepared and received in 1969 (Exh. B-7).

As late as December 8, 1971, Appellant made a new offer with respect to the amount of rent to be paid (Exh. 23; Tr. 53). However, the recreational use of the tidelands was never leased to Appellant.

Appellant recognized that any lease would require a balance between use of the tidelands for recreational purposes and their use for aquaculture (Tr. 137, 143). Notwithstanding, Appellant did not prepare plans to advise the Tribe as to how many people were expected to use the park, what activities were to be offered, what improvements were to be made nor where they were to be located (Tr. 289).

The Tribal Resolution of 1966 does not specifically require either party to protect tribal tidelands, however, the protection of the tidelands is an essential part of the right-of-way grant. All parties intended that tribal interests in the tidelands would not be damaged by the development of the park. The Tribe, however, concedes that charging Appellant with the sole duty of providing

tidelands protection is unreasonable and contrary to the intent of the 1966 resolution (Tr. 78, 84-87, 115, 203).

In a newspaper article of May 14, 1970, Appellant's Director was quoted as saying that Portage Island is 1,000 acres of undeveloped land, accessible by a hike or by boat, but that the park's development plans had not been determined. The article further stated that Appellant had a 200-foot wide right-of-way across the tidelands so that the public could get to the island (Exh. 10.) Later, Appellant qualified the article by adding that the public must obtain permission from the Tribe to use the tidelands (Tr. 55, 56).

Appellant has no park police and took no steps to patrol Portage Island. Although non-Indian use of the island increased after the newspaper article of May 14, 1970, Appellant made only token attempts to preserve tribal interest in the tidelands (Tr. 432). Appellant did not provide financial assistance to the Tribe for tideland protection.

On May 26, 1970, the Lummi Council adopted a resolution to revoke the right-of-way because Appellant had failed to comply with Tribal conditions. The resolution stated that the May 14 article constituted an opening of the right-of-way to public use and as such was a cause for revocation (Exh. 12).

Appellant contends that it had undertaken negotiations in good faith as evidenced by the many negotiation sessions since the drafting of the 1966 Resolution.

Respondent contends that Appellant's lack of planning for development of the park and tidelands did not constitute negotiating in good faith because it evidenced Appellant's failure to recognize the genuine concerns of the Tribe and to make reasonable attempts to resolve those concerns (Tr. 99).

I find that the newspaper article of May 14, 1970, did not constitute a breach of the right-of-way. On its face, the meaning of the disputed condition is clear: upon commencement of good faith negotiations, the right-of-way may be opened to the public.

All the parties agree that, at least until May 1970, the negotiations were reasonable and fair. Good faith negotiation; therefore, had been undertaken and Appellant had a right, absent other considerations, to open the right-of-way to public access.

That Appellant may have failed to recognize the genuine concerns of the Tribe in the lease negotiations alone is not evidence of bad faith in those negotiations. However, Appellant initiated the whole concept of a park on Portage Island (Tr. 37, 38). Appellant, therefore, should have been more responsive to the Tribe when the Tribe requested proposed plans and provisions for protection of aquaculture on the tidelands.

The fifth sub-issue is whether Appellant was required to make improvements across the right-of-way.

The 1966 Resolution provided that if for any reason the area known as "Portage Island" shall cease to be a county park, the right-of-way with improvements shall automatically revert to the Tribe.

Appellant contends that this provision merely envisioned that negotiations would be held to determine what type of improvements would be made.

Respondent contends that the 1966 Resolution obligated Appellant to make improvements across the right-of-way (Tr. 345-46).

The right-of-way was to be improved by the construction of a causeway (Tr. 260, 345-46). In its application to acquire funds, Appellant indicated that the cost of constructing a causeway would be a major development cost (Exh. W-2). Thus, at the time the Business Council gave its consent for the right-of-way, all the parties contemplated that improvements would be constructed (Tr. 175, 176). I find, therefore, that Appellant was required to make such improvements upon the right-of-way.

The second issue is whether the right-of-way should have been terminated under 25 CFR 161.20.

In 1970, the Lummi Business Council concluded that Appellant had violated several conditions of the right-of-way grant. On May 26, 1970, the Council enacted a resolution to revoke the right-of-way (Exh. 12). On April 9, 1971, Respondent notified Appellant by letter that Appellant had 30 days to show cause why the right-of-way should not be terminated for failure to comply with the conditions set forth in the 1966 Tribal Resolution (Exh. 15).

In response, Appellant offered to purchase land on Portage Island from two of the remaining owners. (Exhs. 16 and 17). Appellant also suggested a time and place for renewing negotiations for the lease of the tidelands surrounding Portage Island (Exh. 18).

Respondent, however, did not terminate the right-of-way upon the expiration of the 30-day period. A notice of intent to terminate was not given until approximately 5 years later. During this 5-year gap, Appellant continued efforts to lease the tribal tidelands (Exh. 23-32).

On November 4, 1975, the Lummi Business Council enacted a resolution which requested that Respondent declare the right-of-way null and void. This resolution stated that Appellant had failed to use the right-of-way for the purpose for which it was granted

(Exh. 36). On March 8, 1976, Respondent informed Appellant that the right-of-way would be terminated unless the conditions of the 1966 Resolution were complied with within 30 days (Exh. 37). After a review of the situation, Respondent had concluded that the conditions upon which the Tribe had consented to the right-of-way had not been fulfilled (Tr. 405).

The first sub-issue is a determination of the purpose for which the right-of-way was granted.

Appellant began its purchases of land on Portage Island using locally generated money. Later, Appellant realized that additional funds were available from Federal and State agencies if Appellant could show access from the mainland to Portage Island (Tr. 498). Therefore, Appellant asked the Tribe to immediately grant a right-of-way to assure the funding agencies that access existed to the island.

Since the right-of-way was granted to satisfy funding agencies that access existed to Portage Island, Appellant contends that there was no breach because the right-of-way was used, throughout, for the purpose for which it was granted (Tr. 16-17).

As the beneficial owner of the tidelands surrounding Portage Island, however, the Tribe, through its governing body, could withhold or give consent for a right-of-way. The Tribe could attach such terms and conditions to its consent as it deemed necessary or appropriate. Appellant recognized that the Tribe's consent was granted subject to the terms and conditions imposed by the Tribe's 1966 Resolution (Tr. 19, 153). Further, 25 CFR 161.20(a) provides that failure to comply with any term or condition of a grant is cause for termination of the right-of-way.

In effect, although Appellant may have requested the right-of-way merely to get outside money, the conditions contained in the 1966 Resolution were an inalienable part of the grant. The grant, therefore, is terminable if any condition attached to the grant is unfulfilled.

Earlier, I found that Appellant was obligated to make improvements across the right-of-way as a condition of the 1966 Resolution. The second sub-issue is when were those improvements to be constructed.

Proposed lease agreements were drawn up by Respondent in 1967 and in 1969. Neither of these lease proposals were agreed to by the parties, however, after the second lease proposal in 1969 Respondent and the Tribe began to raise the issue of abandonment or non-use of the right-of-way (Tr. 49).

The 1966 Tribal Resolution provides no time limits for construction of improvements, however, 25 CFR 161.20(b) states that a grant of a right-of-way may be terminated if it has not been used for a consecutive 2-year period for the purpose for which it was granted. Although the subject right-of-way was a means by which Appellant got Federal money for construction of a park on Portage Island, the construction of improvements there was an equally important use for which the right-of-way was granted (Tr. 17-19).

Since the issue of non-use was first raised by Respondent and the Tribe in 1969, I find that the 2-year time period began to run, at very latest, at that time. To date, Appellant has not constructed improvements across the right-of-way. This constitutes a breach of a condition of the right-of-way grant. The grant was, therefore, properly terminated.

The third sub-issue is whether a termination of the right-of-way is equitable.

Eight years elapsed between the first order to show cause issued by Respondent and Respondent's termination of the right-of-way (Tr. 451-484). Appellant expended money and effort to purchase property on Portage Island both before and during this 8-year gap (Tr. 19-20). Appellant contends that, because of lack of diligence, Respondent should not be allowed to terminate the right-of-way.

I find that the Tribe is entitled to termination of the right-of-way notwithstanding that Respondent was extremely slow to act. The fact that Respondent let so much time pass between its show cause letter and its termination of the right-of-way is not cause to invalidate the termination.

Since Respondent holds the subject tidelands, including the area over which the right-of-way passes, in trust for the Lummi Tribe, Respondent has a fiduciary duty to the Tribe. Respondent, therefore, is held to the highest standard of care when dealing with the trust property, Seminole Nation v. United States, 316 U.S. 286, 96 L.Ed. 561 (1942); Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir., 1971); Coomes v. Adkinson, 414 F. Supp. 975 (D.S.D., 1976). Respondent's duty is to act to preserve and protect the trust res whenever reasonable and proper, Sessions, Inc. v. Morton, 348 F. Supp. 694, aff'd, 491 F.2d 854 (9th Cir., 1974).

Notwithstanding that Respondent did not act promptly to preserve and protect the trust res, i.e., the Tribal tidelands, that slowness to act should not be imputed to the Tribe. Since a condition of the grant of the right-of-way was not fulfilled, the grant failed and the Tribe is entitled to termination of the right-of-way.

The proposed findings of fact and conclusions of law submitted by the parties have been considered and, except to the extent that

they have been expressly or impliedly affirmed this decision, they are rejected on the grounds that they are, in whole or in part, contrary to the facts and law or because they are immaterial.

ORDER

The appeal is dismissed.

_____

L. K. Luoma
Chief Administrative Law Judge